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No.....

SUPREME COURT OF THE UNITED STATES

F. H. VAHLSING, PETITIONER

versus

F. O. HARRELL, RESPONDENT

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner, F. H. Vahlsing, submits this his brief in support of his petition for writ of certiorari. The opinion of the United States Court of Appeals, delivered in connection with the judgment of such court here sought to be reviewed, is officially reported in 178 Fed. (2d) 622.

GROUNDS OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit under the provisions of 28 USCA Sec. 347(a).

STATEMENT OF THE CASE

Petitioner and respondent are each the owners of separate tracts of land in Cameron County, Texas, the same being contiguous to each other; petitioner's tract lying east of respondent's tract, the west boundary line of petitioned's land being the east boundary line of respondent's land (Rec. p. 105). A drainage ditch constructed, maintained, and used by the La Feria Water Control and Improvement District runs in a north and south direction, approximately parallel to the east boundary line of respondent's land, and being entirely on the respondent's land. Such ditch is located a distance of approximately 30 to 40 feet west of the respondent's east boundary line (Rec. pp. 105-106). The easement right-of-way, described by metes and bounds in the Amthor letter (hereinafter referred to) extends to and is identical with the east boundary line of the respondent's land (Rec. pp. 76-80). Such easement right-of-way runs the entire length (north and south) of respondent's land and varies in width from 60 to 80 feet (Rec. pp. 117-118). The drainage ditch proper, which was excavated and dug by the water district, lies approximately in the center of the right-of-way described in the Amthor letter, and varies in width across the entire length of the right-of-way, from 6 to 10 feet (Rec. p. 118). In the southwest corner of petitioner's land a water pump is installed in the ground a few feet east of the petitioner's west boundary line and east of the east boundary line of respondent's land; such pump being located a distance of 65 feet east of the center line of the drainage ditch (Rec. p. 71). A suction pipe connected to the water pump extends west into the drainage ditch (Rec. p. 112). Such pipe is buried beneath the surface of the earth below plow depth, 6 or

8 feet (Rec. p. 118). There is no obstruction on the surface of respondent's land in connection with the pump and pipe installation, nor is any character of machinery on the land (Rec. pp. 113-114). Since the installation of such pipe, petitioner has at no time gone or trespassed upon the surface of respondent's land (Rec. pp. 114-115). In 1934 A. W. Amthor, acting as the duly authorized agent of the water district, wrote a letter requesting an easement over the land now owned by respondent (Rec. p. 246). Such letter was answered by Raymond C. Gee, the Vice President and duly authorized agent of the Fort Worth National Company, which at that time owned respondent's land (Rec. pp. 246-247). Immediately after the exchange of such letters, the water district went into possession of said land and excavated and constructed a drainage ditch thereon (Rec. p. 247), and has since that time continuously used and maintained such drainage ditch (Rec. pp. 247-248). The water district has continuously sold water out of the drainage ditch to various persons since its construction. Shortly after the construction of the ditch, the pump and pipe installation involved in this suit was made, and such pump and pipe installation has been in continuous use ever since, and for a period of approximately 9 or 10 years prior to the purchase of the land by respondent from the Fort Worth National Company in 1944 (Rec. p. 247). The pump and pipe installation was made by petitioner with the express consent of the water district, and by means of the use of such pump and pipe installation, petitioner has been withdrawing water from the drainage ditch continuously from the time of such installation until the present, and is still withdrawing water therefrom, paying the water district therefor. The fact as to the pump and pipe in-

stallation and the use thereof by petitioner was open and notorious and known of by the general public, and by respondent when he purchased the land from the Fort Worth National Company in 1944 (Rec. p. 247).

Petitioner filed this action in the United States District Court for the Southern District of Texas, Brownsville Division, on March 23, 1948, seeking a declaratory judgment adjudicating petitioner's right to have and maintain the pump and pipe installation, with the consent of the water district, for the purpose of withdrawing water from the drainage ditch for the irrigation of petitioner's land (Rec. pp. 3-11). Declaratory judgment was rendered February 11, 1949, declaring, in effect, that petitioner did not have the right claimed by him (Rec. pp. 240-242). An appeal was duly prosecuted by petitioner to the United States Court of Appeals for the Fifth Circuit which, on December 21, 1949, affirmed the judgment of the District Court (Rec. pp. 246-251). Petitioner's petition for rehearing, duly filed, was denied on January 24, 1950 (Rec. p. 256).

ASSIGNMENT OF ERROR

The court of appeals erred in affirming the judgment of the district court and in holding, under the undisputed facts, that the petitioner does not have the right, with the consent of the water district involved, to maintain and use the pump and pipe installation involved. Such holding is erroneous because the easement granted was general as to the nature and extent of the burden imposed upon the servient tenement, and the water district and respondent's predecessor in title, having acquiesed in and consented to the pump and pipe

installation by petitioner, and the withdrawal of water from the drainage ditch, for a period of 9 or 10 years following the grant of the easement, the parties to such easement thereby fixed and limited the extent of the burden imposed to the particular course or manner in which the same was enjoyed during such period of time, and the court of appeals should have declared that petitioner, with the consent of the water district, does have the right to maintain and use such pump and pipe installation.

ARGUMENT AND AUTHORITIES

The rule of the law which controls the rights of the parties in this cause, and as sustained by all of the reported cases, is stated in 17 Amer. Jur. Easements, Section 97, as follows:

> "If a grant is specific in its terms, it is decisive of the limits of the easement. If an easement is not specifically defined, the rule is that the easement need only be such as is reasonably necesasry and convenient for the purpose for which it was created. It is also settled that where a grant of an easement is general as to the extent of the burden imposed upon the servient tenement, an exercise of the right, with the acquiesence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed."

Winslow vs. Vallejo, 148 Cal. 723, 84 P. 191, 5 LRA (N.S.) 851, 113 Am. St. Rep. 349, 7 Ann. Cas. 851; Lexington & E.R. Co. v. Hargis, 180 Ky. 636, 203 S.W. 525, citing R. C. L.; Lidgerding v. Zignego, 77 Minn. 421, 80 N. W. 360, 77 Am. St. Rep. 677; Lamka v. El Reno, 111 Okla. 111, 242 P. 241, citing R. C. L.;

Fendall v. Miller, 99 Or. 610, 196 P. 381, citing R. C. L.; Ogden v. Straug Bldg. Corp. 187 Wis. 232, 202 N. W. 34, citing R. C. L. 142 A. L. R. 470. Annotation: 5 L. R. A. (H.S.) 851; 113 Am. St. Rep. 853.

There can be no question but that the opinion of the court of appeals correctly states the law in reference to easements which are specific in terms as to the extent of the burden imposed upon the servient tenement. Where the particular course or manner of enjoyment of the easement is set forth, the language thereof is decisive; however, when the parties to an easement, as here, do not see fit to specify the terms as to the particular course or manner of enjoyment, but see fit to treat such matter in general terms, in this instance "drainage", the subsequent attitude of the parties to the grant may be looked to to determine the interpretation they themselves placed thereon as to the course or manner in which the easement was to be enjoyed, and their interpretation will conclusively determine their unstated intention in the grant.

We have been unable to find any reported opinion in point which holds contrary to the above stated rule. The court of appeals acknowledges that the letters involved were sufficient to grant an easement for the general purpose of "drainage", but the court declined to apply the applicable rule that the parties to the easement had over a long period of years acquiesed in and consented to the particular use to which the easement had been subjected by petitioner, with the consent of the water district, and that such acquiesence and consent fixed such permissive right in the petitioner.

The question here before the court is direct and uncomplicated. If the holding of the court of appeals in this cause is allowed to stand, it will have the effect of overruling all of the previously reported decisions on the point involved. On the contrary, a reversal of the judgments of the court of appeals and district court will have the salutary effect of harmonizing all authorities, both State and Federal, upon this very important question of law.

WHEREFORE, the petitioner, F. H| Vahlsing, respectifully prays that his petition for a writ of certiorari may be granted and that upon hearing hereof the judgment of the Court of Appeals and District Court be reversed, and judgment here rendered declaring petitioner's rights to exist in the respects claimed by him.

Respectfully submitted,

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